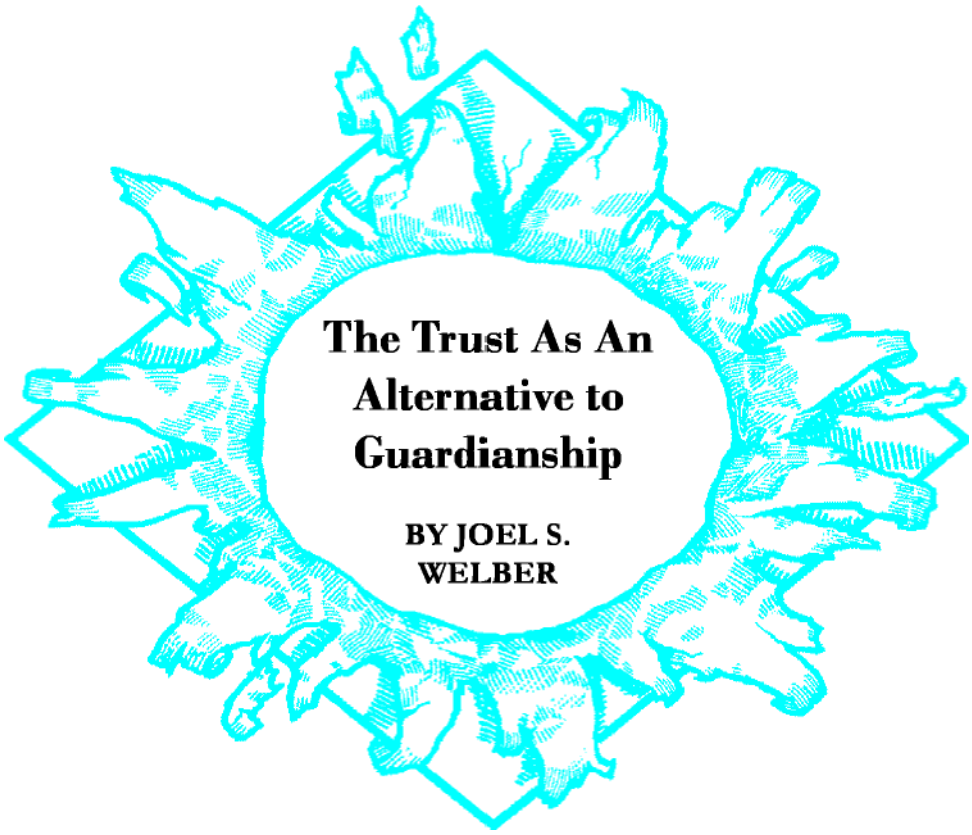

General discussions of alternatives to guardianship do not usually focus on the trust as an important alternative. Trusts are properly seen as estate planning devices for parents who have children with disabilities. Trusts also are commonly used as a device to shelter assets that are otherwise disqualifying for Medicaid if owned by the person with a disability. The following information expands upon these ideas and illustrates why trusts can also be seen as an alternative to guardianship for people with disabilities.

Introduction to Trusts

Many members of the community of people with disabilities are familiar with trusts. Over the past three decades, trusts have emerged as a common, widely accepted estate-planning device for families that have children with disabilities. Trusts enable parents, for example, to leave money for children who are Medicaid eligible. The "third party trust" (parent for child) can provide a source for the purchase of amenities without affecting the children's ongoing eligibility for either SSI or Medicaid. Medicaid does not consider the trust as a countable asset, and properly structured distributions from the trust are not countable income.[1]

In some cases, trusts are created to conform to the provisions of OBRA93 (Omnibus Budget Reconciliation Act).[2] These trusts are designed to move otherwise countable assets belonging to a person with a disability under federal law, into a trust that is not countable as a current asset and to permit distributions for amenities that are also not countable as unearned income. The OBRA 93 trust is used to shelter the Medicaid recipient's own assets, not as an estate-planning device for his or her parents. Such trusts are often necessary to protect ongoing eligibility, for example when an otherwise eligible individual receives an inheritance or personal injury settlement that results in a lump sum distribution of countable assets that are disqualifying for Medicaid.

Most OBRA 93 trusts are what is known as Exception A trusts, and contain a provision that upon the death of the Medicaid recipient (beneficiary), any remaining trust assets will "pay back" any state that has provided medical assistance (Medicaid) to that person during his or her lifetime. The trade off is that the Medicaid recipient enjoys the use of the assets and income that those assets generate during his or her lifetime, and the

state receives the remainder interest of the trust following death in order to get paid back for the benefits received.

Introduction to Guardianship

Generally, the purpose for the creation of a guardianship is to identify and empower a person to make decisions on behalf of another person. The guardian is a surrogate decision-maker, acting on behalf of a ward. In Michigan, if the person for whom a guardian is appointed is a person with developmental disabilities, the guardianship is created by a Probate Court under the authority of the Mental Health Code.

Guardians can be invested with the broadest of powers that can include medical decision making, authority to decide residence, complete control over finances, and virtually any other decision that a person without a guardian can make on his or her own. Courts can also limit a guardian's powers and can reserve certain decision-making authority to the person with a disability in a partial guardianship.

Schools, mental-health bureaucracies, some hospitals, and other institutional providers are comfortable working with guardians; often moreso than in working directly with the individual. The existence of a guardian's Letters of Authority is a license to speak with the guardian about the person with a disability, and allows the institution to by-pass the person with a disability in the decision making process. While the institution may see this process as more "efficient" and substantive than one that requires a decision or consent from a person with disabilities, advocates clearly understand that guardianships are not tools created for the convenience of institutions.

The history of the use of guardianships for people with disabilities suggests that substantial numbers of guardianships have been created without a demonstration of the need for surrogate decision making and certainly without the exploration of suitable alternatives to guardianship. Many parents approach probate courts and request guardianships for their child merely as a function of the child attaining the age of majority. Often these parents are completely unaware of the existence of alternatives to this course of action. Those parents who are made aware of alternatives often pursue alternatives instead of creating guardianships.

The Trust as an Alternative to Guardianship

A trust requires three parties: the Grantor or Settlor who creates the trust, the Trustee who manages the assets held in trust and the Beneficiary, who receives the beneficial use of the trust assets. In an estate plan, the parents are the Grantors and Trustees during their lifetimes. Most of the time, they are also the beneficiaries while either of them is living.

Following the death of the parents, a Successor Trustee who is named in the trust instrument takes over the management of the trust assets. At this time, a separate share or sub-trust is funded for the benefit of the person with disabilities who becomes the beneficiary of that trust. In other words, if a child has disabilities, the parents' estate plan provides that the child's inheritance is put into the hands of a trustee, rather than delivered to the child outright and free of trust.

The role of the trustee is to manage the assets entrusted to it and to make expenditures for the beneficiary consistent with the terms of the trust. Such expenditures are generally in the form of amenities to enhance the quality of the beneficiary's life, rather than to provide basic support such as food and shelter. There is ample literature on what types of expenditures are permissible from a trust created by a beneficiary's parents. This trust is called a "third party trust" in Medicaid parlance.

The trust serves as an alternative to guardianship for at least three reasons.

1. Ownership of the assets in trust alleviates any need for a Guardianship of the Estate of a person with developmental disabilities.

The trust provides a built-in benefit of placing the management of assets into the hands of a trustee and removing the assets from the estate of beneficiary. Because the beneficiary does not have to manage trust

assets, there is no need for any type of judicial intervention to create a guardianship of the estate with respect to these assets.

In cases where no trust is created in the estate plan of the parents (usually as a result of serious oversight), the child with disabilities receives an outright distribution as a devisee (i.e. a person who receives a gift of real property under a will) under a Last Will and Testament. In these cases, one "solution" to the almost certain Medicaid disqualification that results from the inheritance is to create an OBRA 93 trust, with Medicaid payback provisions. Such a trust will create Medicaid eligibility but only upon the beneficiary's death. States' will receive "pay back" for Medicaid payments issued to the deceased beneficiary during his/her lifetime.

Where no OBRA trust is created, there is a loss of Medicaid. Sometimes, this loss may be tolerable if the inheritance is large. However, under even these particular circumstances, there will almost always be a strong inclination on the part of other family members to seek some "protection" of the assets through judicial intervention.

This means that family members or somebody in the community that provides support is likely to seek the appointment of a conservator for a person deemed "legally incapacitated" or a guardian for a person with developmental disabilities. Under either circumstance, whether there is an OBRA 93, Exception A trust or whether there is a guardianship of the estate approved by the Probate Court, the parents failure to properly plan the inheritance produces a result that is less than optimal.

2. The income that the trust assets generate is managed by the trustee, and is only distributed in conformance with the instructions contained in the trust document.

Once the trustee holds assets, the law requires that they be invested under a standard of prudence. The invested assets should produce income, and the income is expended for the benefit of the beneficiary. The trustee is given discretion as to the specific types of expenditures that the trust will make. As noted, these expenditures will ideally improve the quality of life of the beneficiary. The beneficiary is permitted, to the extent possible, to participate in decisions about expenditures. Trust beneficiaries can request distributions; they may not be able to demand distributions under "third party or OBRA 93 trusts," but they can make their requests to the trustee.

In general, these distributions are made without prior court approval and without subsequent court accountings. The relationship between the trustee and beneficiary is private, subject only to periodic possible review by the State Medicaid Agency in the administration of the Medicaid program. Assuming that the trust qualifies as a third party trust or an OBRA 93 trust, and assuming that the expenditures are consistent with the instructions in the trust, this review merely confirms that the beneficiary's eligibility is not affected by the trust or expenditures from it.

The on-going relationship between the trustee and the beneficiary affords each the opportunity to get to know and appreciate the other. Whether the trustee is a bank, a financial services company, or a relative, the trustee can and should solicit input from the beneficiary concerning expenditures. The trust will insulate the assets from third party exploitation and will, at the same time, permit the beneficiary to express his or her own wants and needs in the requests for distribution. There is no part of this relationship that requires judicial involvement

3. Often the trust is the only investment that the beneficiary has access to, albeit at the discretion of the trustee. In addition, the only other income that most beneficiaries have is from Social Security. This income is used to pay for food and shelter and is often handled by a Representative Payee. Again, no guardianship is required to handle any portion of the estate of the beneficiary of the trust.

One thing that many people with disabilities have in common is that they live at or below the poverty level. During the adult lifetime, a person with a disability who is eligible for Medicaid will not own nonexempt assets that exceed $2,000 in value.[1] Also, the individual's income is very limited; in many cases he/she receives SSI or SSDI and perhaps some small wages. This income is almost always consumed monthly on ordinary living expenses.

As a result of these factors, there usually is no “estate” that the person with disability has that would require the protection of a guardianship. It is a somewhat moot point with respect to the protection of assets. The inheritance in trust does not change this picture at all. Certainly, the trust can and should be used to raise the standard of living and enhance the overall quality of life of the beneficiary, but because the trust will necessarily involve a trustee, there is no need to seek court supervision over the management of the assets.

In effect, the trust serves as a suitable and private alternative to guardianship once it is funded and providing enhancements to the beneficiary. To expand upon this point further, a well-drafted trust will contain provisions that instruct or even require the trustee to monitor the well being of the beneficiary, and to periodically assess his or her needs. The trustee may choose to do the assessment personally, or may hire a third party such as a social worker to visit with the beneficiary and to report to the trustee concerning the beneficiary’s “condition” and needs.

Some attorneys recommend that parents name siblings or other close relatives to serve as advisors to the trustee. The advisor provides monitoring services to the trustee and advocacy for the beneficiary. Many parents want to assure that siblings can participate in the decision making processes attendant to the person with a disability that will occur following the parents’ deaths.

However, parents are sometimes leery about entrusting siblings with the management of the beneficiary’s inheritance. As a general rule, trust estates should be professionally
managed unless the entire estate is so small that the trustee advises that professional management does not make financial sense for either party. Most trust officers have the integrity required to make such an observation. At that point, siblings may be the only or best alternative to a corporate fiduciary.

Whether or not an advisor is named in the trust document, the trustee will need to monitor the beneficiary’s needs and will employ such persons as are required to do so. Again, the point is that no guardianship is required to permit this to happen; it occurs naturally as a function of the relationship between a trustee and beneficiary.

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[1] Program Eligibility Manual (PEM) 401

[2] 42 USC 1396p(d)(4)(A)

[3] PEM 400, at 4